

Letter of Findings: 09-0432; 09-0532
Gross Retail Tax
For 2005 and 2006

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ISSUES

I. Bulk Purchases of Auto Parts – Use Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-2(a); IC § 6-2.5-5-8(b); IC § 6-8.1-5-1(c).

Taxpayer argues that it is not subject to Use Tax on the bulk purchase of car parts.

II. Audit Report Adjustments – Gross Retail Tax.

Authority: IC § 6-8.1-5-1(c).

Taxpayer maintains that there are a number of adjustments which – on their face – are incorrect because the underlying transactions are plainly not subject to sales or use tax.

III. Credit Reports – Gross Retail Tax.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-3-2(a); Sales Tax Information Bulletin 8 (May 2002).

Taxpayer states that the purchase of credit report information is not subject to sales or use tax.

STATEMENT OF FACTS

For purposes of this Letter of Findings, "Taxpayer" consists of two used car dealers. Both car dealers have multiple Indiana locations and both are franchise operations.

The Department of Revenue (Department) conducted an audit review of Taxpayer's business records and tax returns. The Department concluded that Taxpayer owed additional sales/use tax. Taxpayer disagreed and submitted a protest to that effect. An administrative hearing was conducted during which Taxpayer's representatives explained the basis for its protest. This Letter of Findings results.

I. Bulk Purchases of Auto Parts – Use Tax.

DISCUSSION

Taxpayer states that it purchased automobile parts which were used to refurbish used cars readying those particular vehicles for sale. Taxpayer explains that its account 65200 includes "bulk purchases of items that will be resold with the vehicles" but that Taxpayer "do[es] not know which vehicle [the parts] will go with at the time of purchase." Taxpayer explains that this category includes such items as brake fluid, windshield wipers, oil, and batteries. Similarly, Taxpayer lists such items in its account 14100 and account 51160 which both represent car parts which are eventually incorporated into a particular vehicle to be sold.

It should be noted, that the items addressed do not include those items used in warranty work. That issue was addressed in the audit report and Taxpayer has not raised that issue.

In summary, Taxpayer argues that the items in accounts 14100, 51160, and 65200 include items which are exempt because the items were ultimately sold to customers.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made."

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2.

Specifically IC § 6-2.5-2-1 provides as follows:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.

(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC § 6-2.5-3-2(a) provides for the complementary use tax:

An excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction, regardless of the location of that transaction or of the retail merchant making that transaction.

However, IC § 6-2.5-5-8(b), provides an exemption for items which purchased for resale. In part, the statute provides that, "Transactions involving tangible personal property other than a new motor vehicle are exempt from

the state gross retail tax if the person acquiring the property acquires it for resale, rental, or leasing in the ordinary course of the person's business without changing the form of the property."

Taxpayer has not met its burden of demonstrating that the items listed in 14100, 51160, and 65200 are exempt. To the contrary, the audit report would appear to have assessed tax on only those items which were separately listed and separately billed to the Taxpayer's customer. However, Taxpayer has raised a question sufficient to warrant a supplemental audit of those accounts and if, as Taxpayer states, the items were purchased and installed in vehicles later resold to its customers, the Taxpayer is entitled to an abatement of initial sales tax assessment.

FINDING

Taxpayer's protest is sustained subject to the results of the supplemental audit.

II. Audit Report Adjustments – Gross Retail Tax.

DISCUSSION

Taxpayer maintains that the audit inappropriately imposed tax on items which, on their face, are subject to neither sales or use tax.

In particular Taxpayer cites to the following particular instances:

One of its invoices indicates that sales tax was paid at the time the original items were purchased;

Amounts paid for the rental of real property are not subject to tax;

Taxpayer purchased intangible advertising services not subject to tax;

Taxpayer purchased exempt advertising design services not subject to tax;

One invoice represents a fee made as a contribution to a racing program;

Taxpayer paid for one of its mechanics to attend a training program;

Taxpayer purchased items from a non-Indiana vendor and which were used at a non-Indiana location;

One credit card invoice was for a cash advance and not the purchase of tangible property;

Certain line items were duplicates and should be eliminated.

Insofar as the nine items listed below, Taxpayer has not proven that any of the items are exempt from sales or use tax. However, Taxpayer has met its burden under IC § 6-8.1-5-1(c) sufficient to warrant a supplemental review of those particular items. The supplemental audit is requested to review Taxpayer's objections as set out in Part II above and make whatever adjustments are warranted.

FINDING

Subject to the results of the supplemental audit, Taxpayer's protest is sustained.

III. Credit Reports – Gross Retail Tax.

DISCUSSION

Taxpayer purchases "credit report services" which it argues are not subject to sales/use tax. Taxpayer claims that the audit incorrectly assessed the tax on what are essentially services and not tangible personal property.

As noted above, IC § 6-2.5-2-1, imposes a sales tax, known as state gross retail tax, on retail transactions made in Indiana unless a valid exemption is applicable. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-3-2(a). There is no statutory provision imposing a gross retail tax on services.

The issue is whether the "credit report services" constitute tangible personal property. In this particular case, what Taxpayer pays for is outlined in a "Subscription Agreement" between itself and a company called InfoUSA. Taxpayer pays \$4,800 each year for an "annual subscription." The contract between Taxpayer and InfoUSA specifies that Taxpayer "is licensing the Product for its end use...."

In this case, Taxpayer is purchasing the electronic equivalent of "tangible personal property." As set out in Sales Tax Information Bulletin 8 (May 2002);

Pre-written programs, not specifically designed for one purchaser, developed by the seller for sale or lease on the general market in the form of tangible personal property and sold or leased in the form of tangible personal property are subject to tax irrespective of the fact that the program may require some modification for a purchaser's particular computer. Pre-written or canned computer programs are taxable because the intellectual property contained in the canned program is no different than the intellectual property in a videotape or a textbook.

Taxpayer is paying for the privilege of accessing "pre-written" software which - according to Taxpayer - supplies credit information. The issue of whether that "information" is subject to sales tax is also addressed later on in the same Information Bulletin which states as follows:

The sale of statistical reports, graphs, diagrams or any other information produced or compiled by a computer and sold or reproduced for sale in substantially the same form as it is so produced is considered to be the sale of tangible personal property unless the information from which such reports was compiled was furnished by the same person to whom the finished report is sold.

Taxpayer purchased a "pre-written" computer product from which it obtains credit reports. This product constitutes a "Pre-written program[], not specifically designed for one purchaser, developed by the seller for sale or lease on the general market in the form of tangible personal property and sold or leased in the form of tangible personal property...." Sales Tax Information Bulletin 8 (May 2002). As a source of credit report information, the information purchased by Taxpayer - via the computer "product," constitutes "the sale of statistical reports... or

any other information produced or compiled by a computer and sold or reproduced for sale in substantially the same form as is [was] produced...." Id.

Given the information produced, the purchase of the "product" from InfoUSA was subject to sales or use tax.

FINDING

Taxpayer's protest is respectfully denied.

SUMMARY

To the extent that Taxpayer can document it purchased car parts and installed those parts in vehicles later resold to its customers, the supplemental audit is requested to review the issues addressed in Part I. The audit report is requested to review the nine specific items as outlined in Part II above. In all other respects, Taxpayer's protests are denied.

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